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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

[redacted]

Petitioners,

v.

[redacted]

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof

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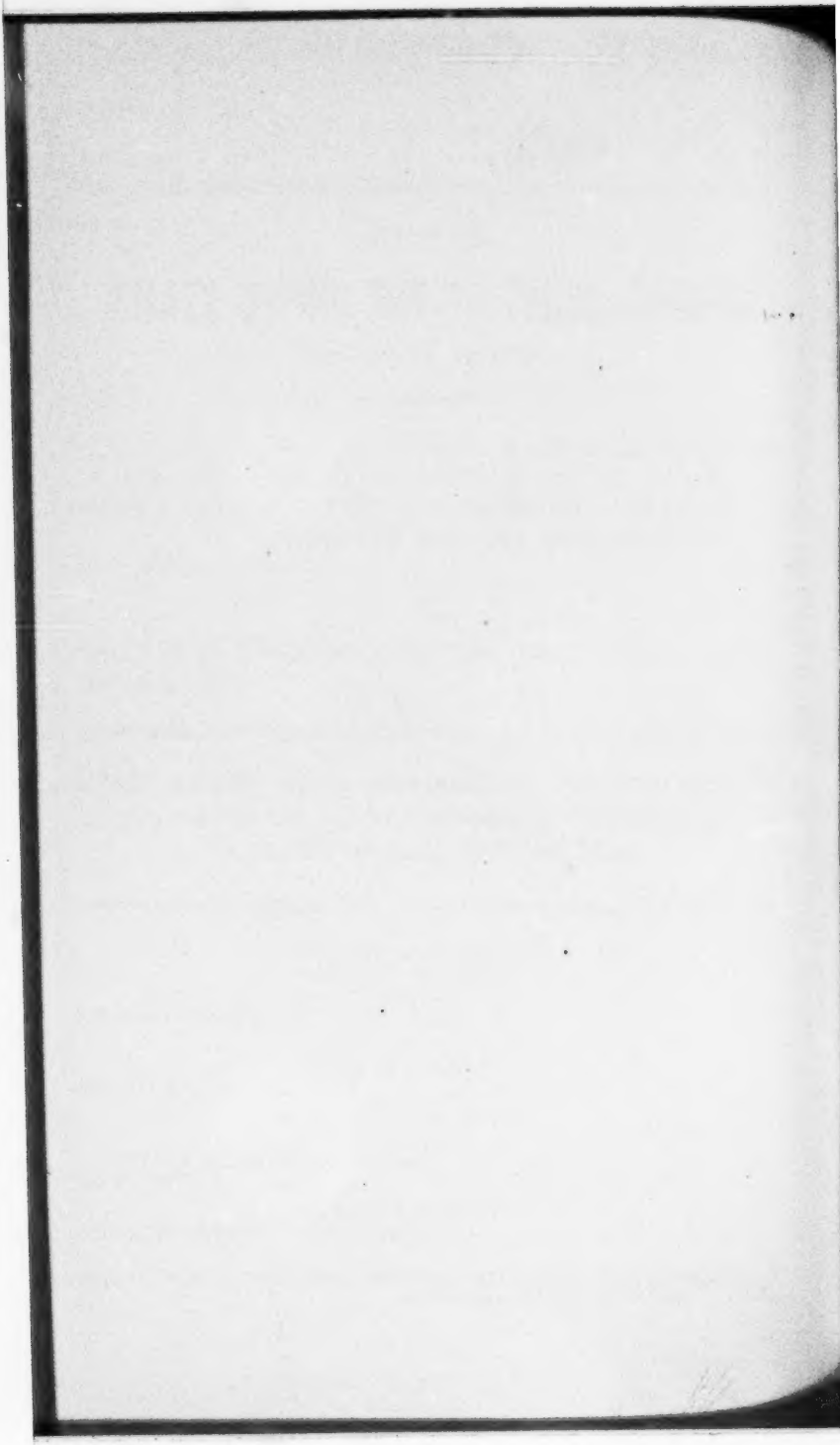

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IN THE

Supreme Court of the United States

OCTOBER TERM 1928.

WABASH RAILWAY COMPANY, MYRON S. HALL, H. W. COHU, LAMOTTE COHU, GERALD V. HOLLINS, GEORGE R. LESLIE, EARLE KRAPP and WILLIAM FRASER DICKSON,

Petitioners,

vs.

JOHN C. BARCLAY and WILLOUGHBY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Wabash Railway Company, Myron S. Hall, H. W. Cohu, LaMotte Cohu, Gerald V. Hollins, George R. Leslie, Earle Krapp and William Fraser Dickson, respectfully show:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit,

to review a decision made and entered in said Circuit Court of Appeals on January 7, 1929 (Circuit Judge LEARNED HAND dissenting) by which a decree of Judge FRANCIS A. WINSLOW of the United States District Court for the Southern District of New York dismissing the bill of complaint on the merits was reversed.

On stipulation of the parties the issuance of the mandate of the Circuit Court of Appeals was ordered stayed to afford the petitioners an opportunity to apply to this Court for a writ of certiorari.

I.

Statement.

This suit was brought by John C. Barclay, as a holder of Five Per Cent Profit Sharing Preferred Stock A of Wabash Railway Company, a corporation of Indiana, to establish a dividend credit amounting to many millions of dollars in favor of the Preferred Stock A, and to enjoin payment of dividends upon its Convertible Preferred Stock B and Common Stock until such dividend credit shall be extinguished (Tr., fols. 1-33).

The defendants in the suit are the Railway Company and certain representative holders of Convertible Preferred Stock B and Common Stock (Tr., fols. 3-6).

The Willoughby Company, a corporation of Pennsylvania, and a holder of Preferred Stock A, intervened as an additional party plaintiff after the decision of Judge WINSLOW and was one of the appellants in the Circuit Court of Appeals (Tr., fol. 282).

In conformity with a charter provision, the right of the Preferred Stock A to dividends is set forth in the Preferred A Stock Certificates in the following language:

> "The holders of Five Per Cent Profit Sharing Preferred Stock A of the Company shall be entitled

to receive preferential dividends in each fiscal year up to the amount of five per cent before any dividends shall be paid upon the other stock of the Company, but such preferential dividends shall be non-cumulative" (Tr., fols. 39-47, 74-81).

II.

The Underlying Question.

The underlying question which this case presents is whether earnings accruing in years in which the full five per cent non-cumulative dividend on the Preferred Stock A was not paid, or no dividend was paid, which earnings were lawfully expended by the Directors in their sound discretion for road and equipment and used for working capital, nevertheless shall be deemed to constitute a credit to the Preferred Stock A; that is to say, the question at issue is whether a non-cumulative Preferred Stock is nevertheless cumulative as to earnings accruing in non-dividend years notwithstanding the fact that the Board of Directors in the exercise of a discretion which is not questioned, have determined that such earnings could not be disbursed in dividends but must be invested in the property.

III.

Reasons for Review.

The petitioners earnestly submit that the prevailing opinion of the Circuit Court of Appeals has decided an important question of general law in a way which is untenable and is in conflict with the weight of authority and in conflict also with at least two leading decisions of this Court, viz.: *New York, Lake Erie and Western Railroad Company* v. *Nickals*, 119 U. S. 296 (1886) and

Continental Insurance Company v. *United States*, 259 U. S. 156 (1922); in conflict with a decision of the Supreme Court of the State of Indiana, the domicile of Wabash Railway Company, viz.: *Star Publishing Company* v. *Ball*, 134 N. E. 283, and in conflict with the common interpretation which has been placed upon non-cumulative preferred stock contracts for many years.

The decision of this Court in the *Nickals* case was rendered in 1886, and hundreds of millions of dollars have been invested upon the understanding and in the belief that under that decision a non-cumulative preferred stock was *in fact* non-cumulative, and if the prevailing opinion of the Circuit Court of Appeals is to stand as the law, many holders of non-cumulative preferred stock will receive dividends in excess of the maximum prescribed by the certificate, and to which they have never deemed themselves entitled, and holders of junior stocks will find their investments impaired and in many cases entirely lost.

As indicating the great importance of this question and the widespread interest in it, the following Railroad Companies have outstanding issues of non-cumulative preferred stock which might be affected by the decision of the Circuit Court of Appeals:

Boston and Maine Railroad Company	$38,817,900 non-cumulative first Preferred Stock
Chicago, Indianapolis & Louisville Railway Company	$5,000,000 4% non-cumulative Preferred Stock
Reading Company	$28,000,000 4% non-cumulative Preferred Stock $42,000,000 4% non-cumulative Preferred Stock

Chicago & Eastern Illinois Railway Company	$22,046,100 6% Preferred Stock, non - cumulative prior to January 1, 1924
The Chicago, Milwaukee and St. Paul Railroad Company	$118,845,800 5% non-cumulative Preferred Stock
Chicago Great Western Railway Company	$47,133,002 4% Preferred Stock, non - cumulative prior to June 30, 1914
Chicago and Alton Railroad Company	$19,557,900 4% non-cumulative Preferred Stock
Colorado and Southern Railway Company	$8,500,000 4% non-cumulative first Preferred Stock $8,500,000 4% non-cumulative second Preferred Stock
Duluth, South Shore and Atlantic Railway Company	$10,000,000 6% non-cumulative Preferred Stock
Gulf, Mobile and Northern Railroad Company	$11,415,600 6% Preferred Stock, non - cumulative prior to January 1, 1920
Kansas City Southern Railway Company	$21,000,000 4% non-cumulative Preferred Stock
Missouri - Kansas - Texas Railroad Company	$45,884,622 7% Preferred Stock, non - cumulative prior to January 1, 1928

Pere Marquette Railway Company	$12,429,000 5% Preferred Stock, non - cumulative prior to January 1, 1919
Minneapolis, St. Paul and Sault Ste. Marie Railway Company	$12,603,400 7% non-cumulative Preferred Stock
Seaboard Air Line Railway Company	$25,000,000 4–2% non-cumulative Preferred Stock $2,273,100 6% non-cumulative Preferred Stock
Western Maryland Railway Company	$10,000,000 4% non-cumulative Preferred Stock
Western Pacific Railway Company	$27,500,000 6% non-cumulative Preferred Stock
Wheeling and Lake Erie Railway Company	$11,882,600 7% Preferred Stock, non - cumulative prior to November 1, 1916 $10,334,958 6% non-cumulative Preferred Stock

The foregoing is not submitted as a complete list or necessarily an accurate list. It is confined to Railroad Companies, but as this Court is aware, there are many hundreds of industrial corporations throughout the United States which have outstanding issues of non-cumulative preferred stock, and thousands of holders of railway and industrial stocks throughout the United States are vitally interested in a prompt determination of this question.

By the decisions of the Circuit Court of Appeals and the District Court, two Judges having taken one view and

two Judges having taken another view, and opinions having been filed in support of these conflicting interpretations of the decisions of this Court and of other Courts, a situation is created which if not corrected by this Court is certain to result in costly litigation throughout the United States. We beg leave to call attention to the dissenting opinion of Circuit Judge LEARNED HAND in the Circuit Court of Appeals, as well as the opinion of Judge WINSLOW in the District Court.

The American law underlying the rights of non-cumulative preferred stock is largely based upon the decision of this Court in the *Nickals* case, the doctrine of which is that the holders of non-cumulative preferred stock are not entitled *of right* to dividends payable out of profits of a particular year, unless the directors of the Company formally declare or ought to declare a dividend payable out of such profits; and if, as is manifestly the case, Judges differ as to the scope and effect of this decision to a point which threatens a widespread disturbance of property rights, it is respectfully submitted that a prompt and final settlement of the question by this Court and the consequent avoidance of conflicting decisions in the various States and in other Circuits is the high function of the writ of certiorari.

Wherefore, your petitioners, referring to the attached brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit, to certify and send to this Court a full and complete transcript of the record herein to the end that the said case may be reviewed and determined by this Court as provided by law, and that the decision of the Circuit Court of Appeals may be reversed, and that your petitioners may have such other

and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

WABASH RAILWAY COMPANY,

By WILLIAM H. WILLIAMS
Chairman of the Board.

MYRON S. HALL
H. W. COHU
LAMOTTE COHU
GERALD V. HOLLINS
GEORGE R. LESLIE
EARLE KRAPP
WILLIAM FRASER DICKSON

UNITED STATES OF AMERICA }
STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

WILLIAM H. WILLIAMS, being duly sworn, deposes and says: That he is Chairman of the Board of Wabash Railway Company, one of the petitioners; that he has read the foregoing petition by him subscribed and knows the contents thereof and that the facts therein stated are true to the best of his knowledge, information and belief.

WILLIAM H. WILLIAMS

Sworn to before me this 2nd day of February, 1929.

(Signed) ALBERT SEGREN
[SEAL] Notary Public, Queens County No. 1633
Certificate filed New York County No. 717
New York County Register's No. 9589
Commission expires March 30, 1929

UNITED STATES OF AMERICA
STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK

MYRON S. HALL, H. W. COHU, LAMOTTE COHU, GERALD V. HOLLINS, GEORGE R. LESLIE, EARLE KRAPP and WILLIAM FRASER DICKSON, being duly sworn, each for himself deposes and says: That he is one of the petitioners above named, that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

MYRON S. HALL
H. W. COHU
LAMOTTE COHU
GERALD V. HOLLINS
GEORGE R. LESLIE
EARLE KRAPP
WILLIAM FRASER DICKSON

Subscribed and sworn to before me this 2nd day of February, 1929.

(Signed) ALBERT SEGREN
[SEAL] Notary Public, Queens County No. 1633
Certificate filed New York County No. 717
New York County Register's No. 9589
Commission expires March 30, 1929

Certificate.

We certify that we have examined the foregoing petition and that in our opinion the petition is well founded and that the case is one in which the prayer of the petition should be granted by this Court.

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Counsel for Petitioners
Myron S. Hall
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CHARLES E. HUGHES
Counsel for Petitioners
Gerald V. Hollins
George R. Leslie and
Earle Krapp

ARNOLD L. DAVIS
Counsel for Petitioner
William Fraser Dickson.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1928.

WABASH RAILWAY COMPANY, MYRON S. HALL, H. W. COHU, LAMOTTE COHU, GERALD V. HOLLINS, GEORGE R. LESLIE, EARLE KRAPP and WILLIAM FRASER DICKSON,

Petitioners,

vs.

JOHN C. BARCLAY and WILLOUGHBY COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

Wabash Railway Company was organized under the laws of Indiana in 1915 with three classes of capital stock:

$46,200,000 of 5% Profit Sharing Preferred Stock A
$49,970,000 of 5% Convertible Preferred Stock B
$47,290,000 of common stock.

The shares of each of the above issues is of the par value of $100. The Preferred Stock A by its terms is non-cumulative. The Preferred Stock B by its terms is convertible after August 1, 1918, into Preferred Stock A and common stock, one share of Preferred Stock B being exchangeable for 50% of its par value in Preferred Stock A

and 50% of its par value in common stock. The Preferred Stock A is preferential in dividends as against both the Preferred Stock B and the common stock and the Preferred Stock B is preferential in dividends as against the common stock, each of these preferred issues being entitled to 5% dividends in each year in preference and priority to the junior stock or stocks (Tr., fols. 34-71). After payment or setting apart in any one fiscal year of five per cent. dividends on the Preferred Stock A, and the Preferred Stock B and on the Common Stock, the Preferred Stock A and Common Stock participate equally in any further dividend distributions (Tr., fols. 76-78).

In event of liquidation the Preferred Stock A is entitled to be paid its full par value plus any *declared* and unpaid dividends, before any payment is made to the Preferred Stock B or common stock; the Preferred Stock B is entitled to be paid its full par value plus any *declared* and unpaid dividends before any payment is made to the common stock; but after payment in full of these amounts to the Preferred A and Preferred B stocks all three classes share equally in the distribution of any remaining assets (Tr., fols. 34-71, 73-82).

The Preferred Stock A is redeemable after December 1, 1920, at the price of 110% of its par value (Tr., fol. 41).

All three classes of stock have equal voting rights (Tr., fol. 80).

The foregoing indicates the salient features of the financial structure of the Railway Company.

In every fiscal year from the date of the organization of the Railway Company to the year 1926, with one or two possible exceptions, there were earnings which the Board of Directors might have applied to the payment of dividends upon the Preferred Stock A without impairing the Railway Company's capital. In certain of these

years, however, the Board declared no dividend on the Preferred Stock A or declared a dividend at a rate lower than 5% (Tr., fols. 15-17, 93, 94, 191).

It was the judgment of the Board of Directors that these earnings ought not to be used for the payment of dividends, but should be applied to the development and improvement of the property which had only recently emerged from receivership (Tr., fol. 94).

That the Board exercised its discretion soundly and fairly is conceded.

This case was heard in the District Court on Bill and Answer, the motion for decree being made upon the pleadings. The allegations of the Answer stand admitted. It was alleged in paragraph Eighth of the Answer and admitted by the motion for decree as follows:

> "The Railway Company admits the allegations contained in paragraph Eighth of the Complaint respecting the payment and non-payment of dividends between the years 1915 and 1926, but it denies that there were large net earnings available for dividends on its Preferred Stock 'A' in the period mentioned in said paragraph and denies that its earnings in any part or parts of said period justified the payment of any dividends which were not actually paid, and, although admitting balances of net earnings in certain non-dividend periods over expenses and prior charges, the Railway Company denies that any part of such balances could, consistently with its lawful obligations to its stockholders, or with its duties to the public in safe and efficient maintenance of property and service, or with sound discretion and the duty of its directors, have been distributed to stockholders, and avers that its entire surplus earnings of all periods since the incorporation of the Railway Company not actually distributed to stockholders and not

reserved for working capital or necessary corporate requirements has been actually appropriated to and is now represented by fixed and permanent improvements and additions to the property and equipment of the Railway Company to enable it adequately to discharge its public duties and protect its property, and that no part of such alleged surplus is represented by any cash or liquid fund or by any accumulation of cash assets available for dividends" (Tr., fols. 93-95).

It is thus alleged in the Answer, and admitted by the respondents, that no part of these earnings could consistently with the lawful obligations of the Railway Company to its stockholders and with its duties to the public in safe and efficient maintenance of property and service or with the sound discretion and duty of its directors, have been distributed to stockholders and that its entire surplus earnings of all periods since its incorporation not actually distributed to the stockholders and reserved for working capital or necessary corporate requirements has been actually appropriated to and is now represented by *fixed and permanent improvements and additions to the property and equipment of the Railway Company to enable it adequately to discharge its public duties and protect its property and that no part of its alleged surplus is represented by any cash or liquid fund or by any accumulation of cash assets available for dividends.*

I.

ARGUMENT.

The discretion of the Board of Directors in the appropriation of earnings for capital purposes is unfettered by the conditions sought to be imposed by the Circuit Court of Appeals.

In pursuing the policy of investing surplus earnings in equipment and plant, the Directors relied upon the decision of this Court in *New York, Lake Erie & Western Railway Company* v. *Nickals*, 119 U. S. 296 (1886). In this case holders of non-cumulative preferred stock sought to compel the Directors to appropriate earnings to the payment of dividends, although in the judgment of the Directors the earnings should be invested in property. This Court sustained the Directors. The following brief quotation from the opinion of Mr. Justice HARLAN discloses the full scope and effect of this Court's decision:

> "A different view would lead to results which sound policy would seem to forbid, and which, therefore, it is not to be supposed were contemplated by the parties. For, if preferred stockholders become entitled to dividends upon a mere ascertainment of profits for a particular year, the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight would be subordinate to their right to payment out of the funds remaining on hand after meeting current expenses and fixed charges. Indeed, there is some ground to contend that, according to appellee's interpretation of the charter, the directors were not at liberty, in any year when the current receipts were in excess of operating expenses, to pay even interest on funded debt, or

> rentals of leased lines, before paying a dividend on preferred stock. We are of opinion that while the agreement of 1877 and the Articles of Association sustained the claim of preferred stockholders to a 6% dividend in advance of common stockholders, the former are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging in the first instance to the directors to determine, with reference to the condition of the company's property and affairs as a whole. As the evidence shows that the profits for the year ending September 30, 1880 were applied to objects that were legitimate and proper, and as the condition of the company was not such as to make the declaration of a dividend a duty upon the part of the directors, we perceive no ground upon which the claim of the appellees can be sustained."

For nearly fifty years it has been the common understanding that in the absence of a statute or contract stipulation to the contrary the discretion of corporate directors in the payment or non-payment of non-cumulative dividends as thus established by this Court is free and unfettered so long as exercised soundly and in good faith; but, under the decision of the Circuit Court of Appeals in the present case, this discretion is completely undermined and annulled; henceforth, if the decision is permitted to stand the discretion of the directors must be exercised subject to at least two destructive conditions:

First: That earnings invested in plant and equipment which might have been used for dividends no longer constitute corporate capital but constitute a separate fund which must be set apart to the credit of the non-cumulative preferred stock.

Second: That no dividends may be declared on junior stocks *even out of current earnings* and in years in which the *full* dividend is paid upon the senior stock or stocks, until the dividend credit of the senior stock is fully satisfied and discharged by the payment of all dividends which the Directors might have declared upon the senior stock in past years if they had not exercised their discretion to invest such earnings in plant and equipment.

The Railway Company earnestly contends that the imposition of such conditions is fundamentally irreconcilable with the underlying principles of the *Nickals* case.

Moreover, the Railway Company confidently submits that the first condition is in conflict with the decision of this Court in the case of *Continental Insurance Company* v. *United States*, 259 U. S. 156 (1922) and that the second condition cannot be reconciled with the decision of the Supreme Court of the State of Indiana in the case of *Star Publishing Company* v. *Ball*, 134 N. E. 283.

The first of these cases arose out of the dissolution of the Reading Company. The controversy there related to the rights of the common stock and the preferred stock in the distribution of capital assets. In that case dividends had been paid for a number of years upon non-cumulative preferred stock, but the Directors of the Company, in the exercise of their sound discretion, had utilized earnings which might have been applied to dividends upon the common stock in building up the property. The common stockholders contended that upon dissolution, the earnings which might have been applied to dividends on the common stock up to the amount of distributions on the preferred stock should be treated in equity as a credit to the common stock. This Court rejected this

contention. The following is from the opinion of Chief Justice Taft:

> "The proper interpretation of the agreement is that, after the declaration of dividends for any current year, the undivided earnings are to be regarded as *capital assets* (our italics) and to be distributed on liquidation, unless the Board of Directors has meantime applied them as dividends. If the argument of appellants were carried to its logical result, all the net earnings of the Reading Company in twenty-five years, no matter how invested or applied to increasing the earning capital, must in liquidation be treated as undistributed profits to go entirely to the common stock without any action of the Board of Directors. This is impossible."

Unless this decision of this Court is to be overruled, it is respectfully submitted that all of the earnings of Wabash Railway Company which the Directors, in the exercise of discretion fully sanctioned by the *Nickals* case invested in road and equipment, must be treated as "capital assets" and cannot be treated as a separate fund equitably owned by the holders of the Preferred Stock A.

The second condition imposed upon the directorial discretion by the decision of the Circuit Court of Appeals places a perpetual restraint upon the payment of dividends upon junior stocks even out of current earnings, unless the amounts already vested in the property and held for working capital are first applied to the satisfaction of the dividend credits of the Preferred Stock A. Even if the Circuit Court of Appeals is right in setting up a separate trust fund for the benefit of Preferred Stock A, all that could possibly be claimed is that such fund ought not to be utilized for dividends on junior stock; there is clearly no logical reason, so long as the trust fund

remains unimpaired, to enjoin the payment of dividends out of current earnings and other resources upon the junior stocks in years in which the full Preferred A dividend is paid. This is not a case where the amounts previously invested in property of the Railway Company and held for working capital are withdrawn and distributed in whole or in part. This is a case where these investments are still held intact and not distributed. *Thus payment of a dividend upon the Preferred Stock B for 1928 already declared out of current earnings is enjoined, although a full 5% dividend for 1928 has been paid upon the Preferred Stock A.*

Apart from the fact that an injunction against the payment of such dividends cannot be reconciled with the *Nickals* case, it is in direct conflict with the decision of the Supreme Court of Indiana in the case last above cited.

The Star Publishing Company was an industrial corporation organized under the laws of Indiana, having outstanding non-cumulative preferred stock and common stock. From 1908 to the time of the institution of the suit, the Publishing Company was prosperous and it appears from the opinion of the Supreme Court of Indiana that from 1911 to 1918 the company could have paid on the first days of March, June, September and December, dividends at the rate of 5% per annum on its preferred stock without depleting its cash assets, impairing its solvency or the rights of its shareholders. During this period the Board of Directors withheld payment of dividends upon the preferred stock and the Supreme Court held that as to at least a part of this period, there had been a gross breach of discretion. It accordingly decreed the payment of dividends upon the preferred stock to the extent of $39,050, although the amount of unpaid dividends on the preferred stock was actually $62,125.

Notwithstanding the fact that $23,075 of preferred dividends remained unpaid, the Court approved the payment of a dividend on the common stock. It is submitted that the foregoing decision under which a dividend was decreed to be paid upon common stock, although dividends on the non-cumulative preferred stock were unpaid during a long period in which they were regularly earned, definitely commits the Supreme Court of Indiana—the State of the domicile of Wabash Railway Company—to the position taken by Circuit Judge LEARNED HAND in his dissenting opinion.

A review of the authorities relied upon by the respondents cannot be made within the limits of this brief. They are reviewed in the opinion of the Circuit Court of Appeals and the dissenting opinion of Circuit Judge LEARNED HAND. All of them will be found to be distinguishable and inapplicable. The cases of *Wood* v. *Lary*, 47 Hun 550 and *Burk* v. *Ottawa Gas & Electric Co.*, 123 Pac. 857, were based upon contracts under which the Board of Directors had no discretion. The case of *Day* v. *U. S. Cast Iron Pipe & Foundry Company*, 126 Atl. 302 and other New Jersey cases arose under a New Jersey statute which also abridged the ordinary directorial discretion. The case of *Collins* v. *Portland Electric Power Co.*, 12 Fed. Rep. (2d Series) 671, is inconclusive; it did not touch the fundamental question decided in the present case by the Circuit Court of Appeals.

That the Circuit Court of Appeals was influenced in reaching the conclusion which it did reach by the argument that unless their discretion is conditioned and restrained Directors may be tempted to build up a property in the interest of junior stocks at the expense of non-cumulative Preferred Stocks is manifest. This plainly is merely speculative. All the stockholders in this case, preferred and common, have equal voting rights and there is no cumulative voting under the laws of Indiana

and preferred shares, which at the outset outnumbered the common shares two to one, are still in the majority according to the record (Tr., fols. 7-9). *Non constat* the Directors have as much Preferred Stock as Common Stock or even more. Such speculations should not be permitted to upset contract rights long vested.

A complete analysis of the Preferred A contract would unduly extend this brief. It is, however, to be noted:

(a) That the Preferred A dividend is "preferential" but not guaranteed or made a charge upon earnings.

(b) That each fiscal year is a separate accounting period and that the preference relates to each accounting period and is not general as in the case of cumulative stock.

(c) That the preference is limited to "dividends" implying the exercise of the ordinary directorial discretion in the creation of a definite legal right.

(d) That the "dividends" are to be "non-cumulative," meaning, as Black says, that "its preference for any given year is extinguished by failure to earn or pay its dividend in that year."

(e) That an additional dividend may be paid upon the Preferred A after paying or setting apart the full dividend in the B stock and 5% on the common, but such additional dividend, like the preferential dividend is dependent upon (1) a declaration by the Board exercising its discretion which (2) must be made "in that year."

(f) That upon liquidation, holders of Preferred Stock A are to be paid the full par value of their shares "and all dividends thereon *declared* and unpaid"—the contract again invoking instead of fettering the ordinary discretion of the directors.

(g) That in like manner the Preferred B and Common Stock are to receive in liquidation the full amount of any "declared and unpaid" dividends.

(h) That in event of a conversion of B Stock into Preferred A and Common there is to be an adjustment "of *declared* and unpaid dividends," but if the present contention of the A stockholders is sound, why not an adjustment of *earned* and *undeclared* dividends? Clearly such a contingency was never contemplated by the author of the Preferred A contract.

(i) That the Preferred Stock A is redeemable as a matter of contract right at 110%—a right clearly inconsistent with the conception of a credit in respect to earnings as to which no dividend is declared.

Moreover, a large amount of Preferred Stock A has been issued over a period of years subsequent to August 1, 1918, upon conversions of Preferred Stock B. Much of the new stock was issued after the alleged dividend credit accrued and clearly such new Preferred A Stock is not entitled to the credit in any event, but much of this new stock has become commingled with the original stock and cannot be identified so that the decision of the Circuit Court of Appeals, even if sound, which we earnestly submit is not the case, is definitely unworkable.

There is further complication. For many years the three stocks of Wabash Railway Company have been listed on the New York Stock Exchange. All shares of Preferred Stock A have been upon a parity and have been quoted at one figure. Under the decision of the Circuit Court of Appeals, it would become necessary to treat shares differently, the difference to be based upon the interest which a particular share has in the alleged dividend credit. Certain shares would be quoted at one price, other shares at another price, and still other shares, perhaps the largest number of all, could not be quoted accurately in relation to the alleged dividend credit, because, as already noted, such stock has lost its identity

and could not be traced to stock issued at a particular time and identified in any definite way with the dividend credit accorded to them by the decision of the Circuit Court of Appeals.

A table showing the period of years over which the Preferred Stock A was issued appears in the record (Tr., fol. 198).

It is submitted that this great question of general law has been erroneously decided by the Circuit Court of Appeals and that the decision of the Circuit Court of Appeals should be reviewed by writ of certiorari and reversed.

Respectfully submitted,

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